

STATEMENT OF CONSIDERATION RELATING TO
401 KAR 5:005 Amended after comments

Energy and Environment Cabinet
Department for Environmental Protection
Division of Water

I The public hearing on 401 KAR 5:002, 5:005, 5:055, 5:060, 5:065, and 5:080, scheduled for May 27, 2009, at 10:00 a.m. at 300 Fair Oaks Road, was held and written comments were received during the public comment period.

II The following people attended the hearing:

<u>Name and Title</u>	<u>Affiliation</u>
Teena Halbig, Vice President	Floyds Fork Environmental Association
Jack Bender	Kentucky League of Cities
Hank Graddy, Attorney	Graddy and Associates
Aloma Dew, Regional Representative	Sierra Club
David Kaelin, Conservationist	
Betsy Bennett, Conservation Chair	Sierra Club, Cumberland Chapter
Joan Lindop	
Rick Clevett	Sierra Club

The following people submitted written or verbal comments:

<u>Name and Title</u>	<u>Affiliation</u>
Teena Halbig, Vice President	Floyds Fork Environmental Association
Gene Nettles	
Bob Weiss, Executive Vice President	Home Builders Association of Kentucky
Lloyd R. Cress, Jr.	Kentucky Association of Manufacturers
Timothy J. Hagerty, Chair, Environmental Policy Committee	Kentucky Chamber
Emily Harkenrider	Legislative Research Commission
Laura Knoth, Director, Public Affairs Division	Kentucky Farm Bureau Federation
Jack Bender	Kentucky League of Cities
Tom FitzGerald, Director	Kentucky Resources Council

Gay Dwyer, Senior Vice President for Government Affairs	Kentucky Retail Federation
Hank Graddy, Chair	Kentucky Watershed Watch
Betsy Bennett and Wallace McMullen, Conservation Chairs	Sierra Club, Cumberland Chapter

III The following people from the promulgating administrative body responded to the written comments:

<u>Name and Title</u>	<u>Affiliation</u>
Peter Goodmann, Assistant Director	Division of Water
Jory Becker, Branch Manager	Division of Water
Larry Sowder, Supervisor	Division of Water
Abby Powell, Regulations Coordinator	Division of Water

IV Summary of Comments and Responses for 401 KAR 5:005

(1) Subject Matter: Technical Amendments

- (a) Comment: Emily Harkenrider (Legislative Research Commission)** Ms. Harkenrider suggested several technical amendments to the regulations, including formatting, grammar, and drafting suggestions.
- (b) Response:** The agency agrees and has made the suggested changes.

(2) Subject Matter: Public Notice and Public Hearing

- (a) Comment: Teena Halbig (Floyds Fork Environmental Association), Gene Nettles, Hank Graddy (Kentucky Watershed Watch)**
The commenters believe that there was not adequate opportunity to comment on the proposed amendments to the administrative regulation and that the public hearing was at an inconvenient time and violated the spirit of the Kentucky Open Meetings Laws.
- (b) Response:** The cabinet tries to make reasonable accommodations for the public to be included in the process; however, budgetary considerations have made it necessary to hold some meetings during work hours. The agency sent notice on April 15, 2009, via US mail, e-mail, and internet posting that regulations were filed on April 14. The notice included the date and time of public hearing and contact information necessary for submitting written comments. The agency met all the requirements of KRS 13A for the public process.

(3) Subject Matter: Statutory Authority

- (a) Comment: Tom FitzGerald (Kentucky Resources Council)**
KRS 224.10-110 should be added to the statutory authority section.
- (b) Response:** The agency agrees and has made the change.

- (4) **Subject Matter: Support for citing federal definitions**
- (a) **Comment: Betsy Bennett (Sierra Club), Hank Graddy (Kentucky Watershed Watch)**
Sierra Club and Kentucky Watershed Watch generally support striking the narrative from Kentucky's regulations and simply referencing the federal citations.
- (b) **Response:** The agency appreciates the support of Sierra Club and Kentucky Watershed Watch.
- (5) **Subject Matter: "Sewage" system**
- (a) **Comment: Jack Bender (Kentucky League of Cities)**
It has been clarified that this regulation only applies to "owner and operator of a sewage system." Although industrial and agricultural wastewater and stormwater treatment plants are already specifically exempted under Section 1(3), DOW may have inadvertently excluded them all under Section 1(1) since those systems generally do not involve "sewage." KDOW should have referenced "sewer systems" which is broadly defined.
- (b) **Response:** The definition of "sewage system" in KRS 224.01-010 includes industrial wastes and other wastes, which would include industrial, agricultural, and storm water. Therefore there is a need for 1(3).
- (6) **Subject Matter: Section 1(3), Reference Error**
- (a) **Comment: Jack Bender (Kentucky League of Cities)**
For IWWTPS, there is an error in the reference to the sections that must be met since the sections have been renumbered after Section 27.
- (b) **Response:** The agency agrees and has made the change.
- (7) **Subject Matter: "Waters of the United States" vs. "Waters of the Commonwealth"**
- (a) **Comment: Jack Bender (Kentucky League of Cities)**
Section 1 should refer to discharges to Waters of the United States.
- (b) **Response:** In addition to implementation of the Clean Water Act through delegation of authority from the Environmental Protection Agency, KRS 224.70-100 requires that the Cabinet protect the Waters of the Commonwealth.
- (8) **Subject Matter: Permit requirements for "liquid" waste systems**
- (a) **Comment: Laura Knoth (Kentucky Farm Bureau Federation)**
We also request that it be clarified that agriculture waste handling systems with "liquid" waste systems are required to obtain KNDOP permits only – not dry waste systems that utilize nutrient management plans, unless they are above the numbers threshold of a CAFO
- (b) **Response:** The agency did not specify the need for dry or liquid waste handling systems to obtain a permit because liquid animal waste is considered "sewage" by definition, 401 KAR 5:002, Section 1(139). In accordance with KRS 224.10-100 the agency has the duty to issue permits for the operation of any sewage system. Division of Water does not require a KNDOP for dry waste handling systems.

(9) Subject Matter: New Forms

(a) Comment: Laura Knoth (Kentucky Farm Bureau Federation)

This section refers to a KNDOP application form ND, and short form B. These forms were not included in the regulations and the dates on these forms indicate they have been updated. We request that the forms be included in the regulations for comment.

- (b) Response:** The forms that are incorporated by reference were amended and the amended forms were filed with the Legislative Research Commission on April 14, 2009, as required by KRS 13A. A summary of the changes to the forms is included in the “Detailed Summary of Material Incorporated by Reference in 401 KAR 5:005”, which was also filed with LRC on April 14, 2009, and included in the public notice of this regulation, as required by KRS 13A.

(10) Subject Matter: Formatting of Section 2

(a) Comment: Laura Knoth (Kentucky Farm Bureau Federation)

We ask that the KNDOP process for livestock operations be separated into a single section for clarity. Section 2, which defines the application process, literally changes reference from sewer lines, to KNDOPS, to WWTPs from one paragraph to another and it is often unclear which permit is being discussed.

- (b) Response:** The agency believes that the requirements are clear. The requirements for KNDOPs are in Section 2(1)(e). The formatting of the regulation complies with the drafting requirements of KRS 13A.

(11) Subject Matter: Process and forms for a KNDOP Certification

(a) Comment: Laura Knoth (Kentucky Farm Bureau Federation)

KFBF requests that before these regulations are finalized, the process and the forms for certification of no discharge be developed. The division will need assistance from the Agriculture Water Quality Authority as well as the agriculture community to implement this requirement. We request that the DOW work directly with the AWQA to develop the process before the regulations can be fully reviewed

- (b) Response:** The form for certification of no discharge was incorporated by reference in 401 KAR 5:060, which was filed in April 2009. The Agriculture Water Quality Act, 224.71-100 through 224.71-145, does not require the agency to review regulations with the Agriculture Water Quality Authority.

(12) Subject Matter: Section 3, Application for a construction permit

(a) Comment: Jack Bender (Kentucky League of Cities)

Please confirm the intent is to clarify that the construction permit application requirements apply to WWTP construction and sewer line extensions. KDOW is now requesting information to be provided in the application as to the sources of the project funding. What is the purpose of this change?

- (b) Response:** The Kentucky League of Cities is correct that the amendments are meant to clarify that the construction permit application requirements apply to WWTP construction and sewer line extensions. Regarding funding information, if funding is from a SPAP or SRF loan then specifications must be reviewed for appropriate funding language.

- (13) **Subject Matter: Open-top component of a WWTP**
- (a) **Comment: Jack Bender (Kentucky League of Cities)**
In section 4(2), it appears a new requirement has been added to prohibit a “new open-top component of a WWTP” from being located within 200 feet of a property line. A provision should be added to provide that a waiver may be obtained from the property owner, and that existing facility expansions should be exempted from the property line setback requirement.
- (b) **Response:** The provision prevents the creation of a new nuisance by an existing plant’s expansion.
- (14) **Subject Matter: Groundwater tracer study**
- (a) **Comment: Jack Bender (Kentucky League of Cities)**
KDOW has proposed to expand the provisions relating to groundwater tracer studies for discharges from a WWTP that enter a sinkhole or a disappearing stream, found in Section 4(5). The criteria appear to be overly stringent with respect to the need to determine potential hydrologic connections with water supply intakes or drinking water wells within 5 miles. Proving that no connection exists may be difficult
- (b) **Response:** The agency believes that the additional language in the amended regulation simply clarifies an existing requirement. Previously, there were no established parameters for evaluating the groundwater tracer study. The amended language complies with a prohibition found in KRS 13A.222 against ambiguous or potentially arbitrary requirements.
- (15) **Subject Matter: Failure to respond to a notice of deficiency**
- (a) **Comment: Jack Bender (Kentucky League of Cities), Timothy Hagerty (Kentucky Chamber)**
This provision, Section 4(8)(b), terminates an application for permit thirty days after issuance of a notice of deficiency in the absence of a response from the applicant. The regulation should provide for extensions of the deadline if good cause is shown. This should be written as permissive and the thirty days should be expanded to sixty days.
- (b) **Response:** The agency believes that this provision is reasonable. If an applicant responds in good faith, the applicant has complied with the requirement to respond within thirty days. Failure to respond to the notice of deficiency demonstrates a lack of concern on the part of the applicant and the process should be terminated.
- (16) **Subject Matter: Bypass or overflow structure, Section 7(4)(b)**
- (a) **Comment: Jack Bender (Kentucky League of Cities)**
A bypass or overflow structure may be allowed if does not cause effluent limitations or water quality standards to be exceeded. This is unclear and vague. For example, would dilution or mixing be considered? At a minimum, this should be revised to read “or cause an in-stream exceedance of water quality standards.”
- (b) **Response:** The agency agrees that the regulation, as filed, was somewhat vague and Section 7(4)(b) has been removed from the amended regulation.

- (17) **Subject Matter: Denial of a sewer line extension**
- (a) **Comment: Bob Weiss (Home Builders Association of Kentucky)**
“The cabinet may deny. . . unless a plan for investigation and remediation that address these conditions has been submitted *and is being implemented*” Change to “remediation that addresses these conditions has been submitted, approved, and will be implemented at the time that the new development discharge into the system.” Many times a developer needs to get the sewer line extension approved to obtain a building permit or other approvals. If the developer must wait to get the sewer line extension approved until a solution to a problem is “implemented”, it may be 6-12 months or longer before the developer can get other approvals that will allow construction to begin. This concept needs to be consistent with Section 9(2) and (3).
- (b) **Response:** The cabinet believes the provision is necessary to ensure that work is being done to the collection system to correct the capacity problem and allow additional flow into the system. This provision will not result in additional delays in the approval process for a sewer line extension.
- (18) **Subject Matter: Fifty feet setback requirement application**
- (a) **Comment: Jack Bender (Kentucky League of Cities)**
The provision in Section 8(14) would require sewer lines to be located at least 50 feet away from an intermittent or perennial stream. The concern is this could be construed to include effluent ditches. Therefore, the 50 foot setback should apply to “Waters of the US” since Waters of the US do not include non-jurisdictional effluent ditches. Also, KDOW should include a provision that a variance may be requested from the 50 foot buffer. Alternatively, the regulation should not be amended.
- (b) **Response:** The cabinet does not intend to include effluent ditches as Waters of the Commonwealth, so the setback requirements do not apply to those ditches. The cabinet has included an allowance for a variance, in Section 8(14)(b).
- (19) **Subject Matter: Variance to setback requirement**
- (a) **Comment: Bob Weiss (Home Builders Association of Kentucky)**
Under Section 8(14)(b), a variance can be requested. This variance will create another self-inflicted approval process that the cabinet does not have the staff to implement and will take an extended period of time to receive approval. The sewer line will require a storm water construction permit. This permit will have appropriate conditions to protect the stream and meet KY’s antidegradation requirements. The former language contained in this regulation is more appropriate.
- (b) **Response:** The process in the amended regulation is equivalent to what HBAK has suggested in its comment. The process in the amended regulation is not a change from the current process and the amended language complies with the drafting requirements of KRS 13A.
- (20) **Subject Matter: Requirements to avoid sewer extension denial**
- (a) **Comment: Jack Bender (Kentucky League of Cities)**
It is unclear what type of commitment would be necessary to avoid such a mandatory sewer line extension denial. KDOW should provide clarification of the type of commitment that is necessary.

- (b) **Response:** It would be difficult to anticipate all appropriate remedial measures. The language in the regulation allows the cabinet and applicant some discretion in how to best address capacity problems in the system. This process may involve an administrative order.
- (21) **Subject Matter: Infiltration-inflow correction**
- (a) **Comment: Jack Bender (Kentucky League of Cities)**
The use of the word “correct” in Section 9(5)(b)2. seems to imply that transport and treat may not be an option. DOW should change the word “correct” to “address”. A more fundamental question is what type of cost and length of time factors will be considered with respect to approval? Please amend the regulation to state that “the cabinet shall approve the study and schedule where it is shown the remedial work will be completed as soon as practicable, taking into account the affordability of the projects in light of the overall costs of CWA compliance and flooding control.”
- (b) **Response:** The cabinet believes that the additional language narrows the scope of approval to cost and time measures, which were absent in the previously effective regulation. The specifics of those requirements may be a part of an administrative order.
- (22) **Subject Matter: Reliability and redundancy, Section 13**
- (a) **Comment: Jack Bender (Kentucky League of Cities)**
A provision should be included to clarify that these amended provisions for reliability are not retroactive. Independent power sources should be defined or clarified. All WWTPs that discharge to a waterbody designated as an OSRW will be classified as Grade A. This seems overly broad. It is recommended that this provision be revised to exclude OSRWs
- (b) **Response:** The regulation has been structured to address only new or expanded facilities; therefore, retroactivity is not an issue. The agency believes that the concept of “independent” is understood, and KRS 13A prohibits a regulation from defining a term if the typical definition applies. The agency also believes that Outstanding State Resource Waters (OSRWs) require a greater degree of protection and the Grade A classification is appropriate. The changes in this regulation, combined with provisions of 401 KAR 10:030, will lessen the burden of compliance for a regulated entity.
- (23) **Subject Matter: Scope of enforceable regulations**
- (a) **Comment: Teena Halbig (Floyds Fork Environmental Association), Betsy Bennett (Sierra Club), Hank Graddy (Kentucky Watershed Watch), Jack Bender (Kentucky League of Cities)**
In Sections 24(3)(a) and 25(7)(a), the Division proposes to amend “administrative regulations promulgated pursuant thereto” to “401 KAR Chapter s 4 through 11”. FFEA expresses concern that this removes those regulations relating to air toxics. Sierra Club and Kentucky Watershed Watch believe that narrowing the regulation citation to only 401 KAR Chapter 4 – 11 is improper, as the previous citation was to administrative regulations promulgated under KRS Chapter 224. Kentucky League of Cities believes that the inclusion of the reference to 401 KAR Chapters 4-11 is improper because of the potential to include conditions relating to the Safe Drinking Water Act.
- (b) **Response:** The agency agrees that giving a narrow range of regulations limits the scope of this provision. However, the narrow scope is necessary because Division of Water

does not have enforcement authority for programs outside of the Division of Water. The narrowed scope is also required by the drafting requirements in KRS 13A.

(24) Subject Matter: Water quality standards in a mixing zone

(a) Comment: Jack Bender (Kentucky League of Cities)

A provision is included in Section 24(3)(b) to require that the effluent not violate 401 KAR chapter 5 or 10. Chapter 10 should not be referenced since it is unclear what a “violation of a water quality standard” would entail. KPDES permits issued pursuant to chapter 5 must include water quality-based limitations where appropriate and may take into account mixing zones and ZIDs. This provision, as written, could be construed as an absolute restriction on any discharge that may exceed any water quality criterion at the end of pipe. It should be clarified to be consistent with water quality-based KPDES permitting requirements.

(b) Response: The requirements in this section of the regulation relate to the construction of a WWTP, not the operation of a WWTP. The proper design of a WWTP may still require that the operation of that WWTP utilize a mixing zone or ZID. If the operational permit provides for a mixing zone or zone of initial dilution, water quality standards are not imposed within that zone.

(25) Subject Matter: NRCS Code 590

(a) Comment: Gay Dwyer (Kentucky Retail Federation)

Kentucky Retail Federation identifies a typo in Section 25(1) and is also concerned with the inclusion of NRCS Code 590 in both Section 25 and its incorporation by reference in Section 30. The nutrient management code developed by NRCS is designed to serve as a guidance document rather than a regulatory standard.

(b) Response: NRCS Code 590 is the standard for permitting review, so it is appropriate to incorporate by reference in the regulation. The citation to the AWQA has been corrected.

(26) Subject Matter: Nutrient Management Plan

(a) Comment: Teena Halbig (Floyds Fork Environmental Association), Rick Clewett (Sierra Club)

FFEA requests that the Division address how the nutrient management plans required as part of a KNODP apply to waste disposal, particularly the potential to affect the Dead Zone.

(b) Response: The referenced section of the regulation requires and Animal Feeding Operations to develop nutrient management plans consistent with the Agriculture Water Quality Act. Section 25(2)(h) specifically requires the plan to “establish protocols to land apply manure, litter, or process wastewater in accordance with site-specific nutrient practices that ensure agricultural utilization of the nutrients in the manure, litter, or process wastewater”, if those standards are applicable to the subject agricultural operation. Nothing in the citation noted above relieves the agency of the duty to issue permits for sewage systems pursuant to 224.10-100. See also comments and responses (8). Proper nutrient management and protection of local water quality both serve to enhance remediation and protection of downstream water bodies, such as the Gulf of Mexico.

- (27) **Subject Matter: Section 25(6), Provision for KNDOPs**
- (a) **Comment: Teena Halbig (Floyds Fork Environmental Association), Gene Nettles, Betsy Bennett (Sierra Club), Hank Graddy (Kentucky Watershed Watch)**
Sierra Club, FFEA, Mr. Nettles, and Kentucky Watershed Watch strongly oppose the KNDOP provisions and believe it allows the operator to decide the permit determination. Commenters are also concerned that that KNDOP provisions “undo” the Concentrated Animal Feeding Operation permit requirements established in 401 KAR 5:065.
- (b) **Response:** EPA’s rule for Concentrated Animal Feeding Operations was finalized in November, 2008, in response to the 2nd Circuit decision in the WaterKeepers Alliance, Inc. v. U.S. EPA, 399 F.3^d 486 (2nd Cir. 2005). The final rule specifies that NPDES permits are not required for concentrated animal feeding operations (CAFOs) that do not discharge or propose to discharge to waters of the United States. Kentucky is adopting the no discharge certification form suggested by EPA in the 2008 Final Rule. The regulation does not “undo” the Kentucky CAFO rules; the regulation requires animal feeding operations to have nutrient management plans, which the Cabinet recognizes as the appropriate tool for protection of waters of the Commonwealth from animal agricultural operations.
- (28) **Subject Matter: Change of Ownership**
- (a) **Comment: Jack Bender (Kentucky League of Cities)**
A change in ownership certification requires a minor modification of the operating permit, but the section on operating permits does not provide for minor modifications. It may be useful to include a reference to minor modifications in Section 27.
- (b) **Response:** The agency agrees that the language in Section 28 referencing a “minor modification” may be confusing to the regulated community. The reference to minor modification has been eliminated
- (29) **Subject Matter: Federal Mandate Analysis Comparison**
- (a) **Comment: Teena Halbig (Floyds Fork Environmental Association)**
FFEFA inquires why there is not a federal mandate analysis included with this regulation.
- (b) **Response:** KRS 13A.245 requires that an agency file a federal mandate analysis only when the administrative regulation is in response to a federal mandate. There is not a federal code or regulation mandating the subject-matter of this administrative regulation; therefore, a federal mandate analysis is not required.
- (30) **Subject Matter: “General permit versus individual permit for CAFOs”**
- (a) **Comment: Tom Fitzgerald (Kentucky Resources Council)**
KRC believes that individual permits should be required for all confined animal production operations and that the use of a “general permit”, in which standard conditions are applied, is inappropriate.
- (b) **Response:** The agency is currently issuing only individual permits to animal feeding operations. However, the agency believes that circumstances for smaller animal feeding operations may be appropriate and adequate to protect the environment.

(31) Subject Matter: “Nutrient management plan requirements”

(a) Comment: Tom Fitzgerald (Kentucky Resources Council)

KRC believes that more detailed manure management plans should be required as part of any permit that demonstrate that the manure waste and wastewater will be managed so as to prevent nuisance and pollution; that the manure management plan should be developed by a trained agronomic professional; and that the plan should include analysis of the suitability of the land for land application, evaluation of soil and subsoil permeabilities, potentiometric mapping and identification of aquifers, evaluation of vulnerability of groundwater resources, soil slope, erodability, land use of proposed disposal site and surrounding land uses, and existence of water withdrawals downstream of proposed disposal site. In addition, the applicant should be required to characterize the geological setting proposed for land application of wastes from such operations; including identification of any aquifer capable of beneficial use and quarterly monitoring or other data indicating seasonal water table elevation, quality and groundwater flow patterns; Revisions to the plan should not be considered “minor” unless of a technical nature that does not change the rate, manner, concentration or conditions of application.

(b) Response: The agency currently requires applicants to submit nutrient management plans that meet industry and U.S. EPA standards, and these nutrient management plan requirements address many of the suggestions provided by KRC. The agency does not currently have statutory authority to require that plans be developed by a trained agronomic professional, but the plans received to-date have been prepared by trained agronomic professionals. The nutrient management plan requirements are consistent with the requirements in the federal rule. The agency has the authority to require additional considerations or evaluations, as appropriate. The agency believes that routine modifications to the nutrient management plan are not major modifications and are necessary and appropriate for the permit holder to operate effectively and in a protective manner under existing circumstances.

(32) Subject Matter: “Odor controls and other requirements”

(a) Comment: Tom Fitzgerald (Kentucky Resources Council)

KRC recommends that best available control technology, including filtering or scrubbing confinement building emissions, requiring covers if anaerobic lagoons are employed, and requiring injection or knifing of any liquids and solids that are land-spread, should be required in addition to use of setbacks.

(b) Response: The agency has the authority to require additional controls and practices, as appropriate. The agency believes that including specific requirements in the regulation (cf. the permit) is not appropriate or effective.

(33) Subject Matter: “Odor controls and other requirements”

(a) Comment: Tom Fitzgerald (Kentucky Resources Council)

KRC believes that odor control measures should be required for all phases of the operation, including controls on management of liquids and solids to minimize odor creation in confinement buildings, and ventilation and filtration of confinement building air, covering lagoons which rely on anaerobic treatment, considering separate management of liquids and solids, and covered manure storage tanks.

- (b) **Response:** The agency has the authority to require additional controls and practices, as appropriate. The agency believes that including specific requirements in the regulation (cf. the permit) is not appropriate or effective.
- (34) **Subject Matter: “Spill and Release Reporting”**
- (a) **Comment: Tom Fitzgerald (Kentucky Resources Council)**
KRC recommends requiring immediate reporting of any releases or spills, leaks or groundwater contamination should be required.
- (b) **Response:** The requirements for reporting spills and releases are addressed in KRS 224.01-400 through 224.01.405
- (35) **Subject Matter: “Berms”**
- (a) **Comment: Tom Fitzgerald (Kentucky Resources Council)**
KRC recommends that berms should be constructed around fields accepting landspread wastes, to assure that no runoff contaminated with nutrients is discharged into streams or lakes.
- (b) **Response:** The agency understands that there are a number of edge-of-field practices that can improve protection of water quality from the application of manure, fertilizers, and pesticides. These practices are developed by research universities and the Department of Agriculture and translated to the farmers via various publications, educational outlets, and user groups. The use of berms is not a standard practice, to our knowledge and may create other challenges, such as flooding. However, producers that choose that practice are free to do so.
- (36) **Subject Matter: “Financial Assurance Tools”**
- (a) **Comment: Tom Fitzgerald (Kentucky Resources Council)**
KRC maintains that the regulation should include financial assurance tools that require adequate funds set aside to assure proper closure of the facility and clean-up of any spills or releases, and that no permit should be approved for a confined animal facility without the posting of financial assurance and a non-cancelable insurance policy, and that the bond and assurances be submitted prior to approval of any permit.
- (b) **Response:** The agency does not have the statutory authority to require financial assurance tools as part of the permit review and issuance process.
- (37) **Subject Matter: “Liability insurance to pay for nuisance claims”**
- (a) **Comment: Tom Fitzgerald (Kentucky Resources Council)**
KRC maintains that there should be a requirement for maintaining liability insurance to pay any judgments or claims from third-parties that a nuisance has been created by the facility, and to pay any third-party injury claims or loss of property value.
- (b) **Response:** The agency does not have the statutory authority to require liability insurance to pay judgments or claims resulting from third party litigation as part of the permit review and approval process.

(38) Subject Matter: “Criminal and Civil penalties”

(a) Comment: Tom Fitzgerald (Kentucky Resources Council)

Civil as well as criminal penalties should be provided. A requirement should be included that past compliance history of all owners and controllers of the applicant be disclosed, including violations in other states of air, waste and water pollution and public health laws, and a prohibition against issuance of new permits to any facility which has an outstanding unresolved violation of any air, land or water pollution law, or owns or controls or is owned or controlled by an entity with such outstanding violations, or which has forfeited a performance bond or otherwise demonstrated general obligation to prevent a pattern of willful or unwarranted failure to comply with the environmental laws of any state or community.

(b) Response: Criminal and civil penalties for violations of are outlined in appropriate state and federal statutes.

(39) Subject Matter: “Responsibility for avoidance of nuisance conditions”

(a) Comment: Tom Fitzgerald (Kentucky Resources Council)

KRC maintains that the responsibility for avoidance of nuisance conditions should rest with the owner of animals jointly with the operators. Any contract seeking to shift responsibility back to contract farmer or other third party void as against public policy. Owners/controllers should be jointly responsible for preparing and complying with the permits, even where they contract with others to raise the animals. The imposition of responsibility for environmental compliance on the party contracting with the local producer is not without precedent, and is particularly appropriate in this case since the input and output decisions are largely dictated by the corporations and their integrators. The responsibility for environmental compliance should rest primarily with the corporation and integrators, and the regulations should prohibit any contract clause which attempts to shift that responsibility back to the farmer.

(b) Response: This regulation does not address or encompass responsibility for nuisance conditions; nuisance issues are a matter of common law. The permits are written to address potential nuisance conditions with the requirement of setbacks and other management practices. The issues of integrator liability and co-permitting have been litigated and the agency believes that the recommendations KRC makes require legislative action to employ.

(40) Subject Matter: “Operator certification program for swine facilities”

(a) Comment: Tom Fitzgerald (Kentucky Resources Council)

KRC recommends that an operator certification program comparable to that provided for other wastewater system operators, should be developed to assure that minimum competency standards for operators of intensive swine production facilities are met.

(b) Response: The operator certification program proposal is outside of the scope of the proposed regulation.

V Summary of Statement of Consideration and Action Taken by Promulgating Administrative Body

The Division of Water reviewed the comments and, as a result, is amending the administrative regulation as follows:

Page 1

RELATES TO

Line 6

After “224.70-110,” insert the following:
40 C.F.R. 144, 26 U.S.C. 501(c)(3), 42 U.S.C. 300f – 300j,

Page 1

STATUTORY AUTHORITY

Line 8

After “AUTHORITY: KRS”, delete “224.01-110,”
After “224.10-100”, insert “(5), 224.10-110”.

Page 1

NECESSITY, FUNCTION, AND CONFORMITY

Line 10

After “224.10-100”, insert “(5)”.

Line 17

After “of facilities under”, insert “401 KAR Chapter 5”.
Delete “this chapter”.

Page 2

Section 1(1)(b)

Line 7

After “KAR 5:057;”, insert “or”.
Delete “and”.

Page 3

Section 1(3)

Lines 3 and 4

After “system, industrial WWTP”, insert “, or a”.
Delete “and”.

Page 3

Section 1(3)(a)1.b.

Line 12

After “a KPDES permit”, insert “; and”.
Delete the period.

Page 3

Section 1(3)(a)2.

Line 13

After “other agricultural”, insert “waste”.
Delete “wastes”.

Page 3

Section 1(3)(a)2.a.

Line 14

After “a. Obtain”, insert “a permit”.
Delete “permits”.

Line 15

After “25, 27, and”, insert “30”.
Delete “29”.

Page 4

Section 1(3)(b)1.b.

Line 1

After “25, 27, and”, insert “30”.
Delete “29”.

Lines 1 and 2

After “this administrative regulation;”, insert “and”.

Page 4

Section 1(3)(b)1.c.

Line 3

After “modify the facility”, insert a semicolon.
Delete the period.

Page 4

Section 1(3)(b)2.d.

Line 14

After “modify the facility”, insert “; and”.
Delete the period.

Page 4

Section 1(3)(c)1.

Line 19

After “shall not be”, insert “required”.
Delete “require”.

Pages 4 and 5

Section 1(3)(c)1.a.

Lines 23 and 1

After “through 5:080 and”, insert “401 KAR”.

Page 5

Section 1(3)(c)2.

Line 7

After “25, 27, and”, insert “30”.

Delete “29”.

Page 5

Section 2(1)

Lines 10 and 11

After “submitted on the”, insert the following:

applicable forms established in this subsection

Delete “following applicable forms”.

Page 6

Section 2(1)(d)

Line 10

After “operational permit or”, insert “renewal”.

Delete “renewals”.

Page 6

Section 2(1)(e)1.

Line 14

After “of agricultural”, insert “waste”.

Delete “wastes”.

Page 7

Section 2(2)(a)

Line 10

After “(a) An”, insert “application”.

Delete “applications”.

Page 7

Section 2(2)(a)1.

Line 13

After “municipality, state, federal”, insert a comma.

Page 8

Section 3(3)(a)1.

Line 22

After “be constructed and”, insert “how”.

Page 11

Section 3(8)

Lines 22 and 23

After “sludge management plan”, insert “that”.

Delete “which”.

Page 13

Section 4(3)

Line 5

After “point or direct”, insert “discharge”.
Delete “discharges”.

Page 13

Sections 4(4) and 4(4)a. (Should Have Been 4(4)(a))

Lines 11 and 12

After “cabinet shall consider”, insert “the: (a)”.
Delete “: a. The”.
Capitalize the first letter of “distance”.

Page 13

Section 4(4)b. through h. (Should Have Been 4(4)(b) through (h))

Lines 13 through 19

Note to Compiler: Insert paragraphs (b) through (h) and delete clauses b. through h., respectively.

Page 14

Section 4(5)(c)

Line 9

After “groundwater tracer study”, insert a comma.

Page 16

Section 6(5)

Line 1

After “an agricultural”, insert “waste”.
Delete “wastes”.

Lines 1 and 2

After “handling system or”, insert the following:
to a renewal of a KNDOP permit
Delete “renewals of KNDOP permits”.

Page 17

Section 6(6)

Lines 16 and 17

After “data shall demonstrate”, insert “that”.

Line 17

After “been violated and”, insert “that”.

Page 18

Section 7(1)(a)1.

Line 2

After “1.”, insert “A deviation”.
Delete “Deviations”.

Line 3

After “for the request”, insert “pursuant to this paragraph”.

Page 18

Section 7(1)(c)

Line 12

After “(c) Other practices”, insert “shall”.

Delete “may”.

After “have not occurred”, insert a comma.

Delete “and”.

After “not been violated”, insert the following:

, and design calculations and documentation to support the other practice have been submitted to the cabinet

Page 19

Section 7(3)(c)

Line 10

After “(c)”, insert “A”.

Delete “U”.

Page 19

Section 7(4)

Line 13

After “a WWTP unless”, delete “: (a)”.

Page 19

Section 7(4)(a)

Line 15

After “and there is”, insert “not a”.

Delete “no”.

After “feasible alternative”, insert a period.

Delete “; or”.

Page 19

Section 7(4)(b)

Lines 16 through 18

Delete paragraph (b) in its entirety.

Page 24

Section 8(18)

Line 13

After “(18) A pump”, insert “station”.

Delete “stations”.

Page 24

Section 8(19)

Line 17

After “main shall have”, insert “an”.

After “air release”, insert “valve”.

Delete “valves”.

Page 25

Section 9(2)

Line 12

After “of the WWTP”, insert “agrees to address”.

Delete “commits to addressing”.

Page 25

Section 9(2)(a)

Line 14

After “(a)”, insert “1.”.

Line 15

After “the permitted amount”, insert “. 2.”.

Delete the comma.

Capitalize the first letter of “the”.

Page 25

Section 9(3)

Line 21

After “sufficient flow or”, insert “adds load”.

After “sufficient”, delete “load”.

Line 22

After “of the WWTP”, insert “agrees to address”.

Delete “commits to addressing”.

Page 26

Section 9(4)(a)

Lines 5 and 6

After “section, as applicable,” insert “or”.

Delete “and”.

Page 26

Section 9(4)(a)2.

Line 10

After “of industrial flow;”, insert “or”.

Delete “and”.

Page 26

Section 9(4)(b)

Line 11

After “(b)”, insert the following:

If subject to excessive infiltration or excessive inflow,

Line 12

After “facility with a”, insert “KISOP”

Delete the following:

KPSOP is subject to excessive infiltration or excessive inflow

Page 26

Section 9(5)

Line 15

After “analysis and if”, insert “it cannot be”.

Delete “not”.

Line 16

After “sewer system, or”, insert “affected portion of”.

Delete “that are”.

Page 29

Section 10(12)

Line 10

After “A WWTP with”, insert “a”.

After “monthly average permit”, insert “limit”.

Delete “limits”.

Line 11

After “provide additional treatment”, delete “units”.

Page 29

Section 10(13)

Lines 12 and 13

After “WWTP that serves”, insert the following:

a restaurant or other similar establishment where food is
Prepared and served and a food grinder is

Delete the following:

restaurants or other similar establishments where food is
prepared and served and food grinders are

Page 30

Section 11(1)(b)2.

Line 6

After “effluent limits;”, delete “or”.

Page 30

Section 11(1)(c)3.

Line 14

After “effluent limits”, insert “, or”.

Delete the period.

Page 31

Section 12(2)(b)3.

Line 10

After “A WWTP with”, insert “a lagoon that has”.

Delete “lagoons that have”.

Page 31

Section 12(3)(a)

Line 16

After “axis of flow”, insert a comma.

Page 34

Section 13(2)(b)1.

Line 11

After “1.”, insert “a”.

Page 34

Section 13(2)(b)1. and 2.

Lines 12 and 13

After “disinfection; and”, insert “b”.

Delete “2.”.

Page 34

Section 13(2)(b).2. and 3.

Lines 15 and 16

After “sludge process; or”, insert “2”.

Delete “3.”.

Page 34

Section 13(2)(c)1.

Line 19

After “1.”, insert “a”.

Page 34

Section 13(2)(c)1. and 2.

Lines 20 and 21

After “disinfection processes; and”, insert “b”.

Delete “2.”.

Page 34

Section 13(2)(c)2. and 3.

Lines 22 and 23

After “disinfection processes; or”, insert “2.”.

Delete “3.”.

Page 35

Section 13(2)(d)2.

Line 5

After “alternative measures for”, insert “an intermediate”.

Delete “a medium”.

Page 40

Section 17(3)

Lines 2 and 3

After “with a slope”, insert “not”.

Delete “no”.

Page 40

Section 18(1)

Lines 7 and 8

After “be less than”, insert a colon.

Page 40

Section 18(1)(a)

Line 9

After “lagoon surface for”, insert “a”.

Lines 9 and 10

After “nonaerated primary lagoon”, insert “system”.

Delete “systems”.

Page 40

Section 18(1)(b)

Line 11

After “lagoon surface for”, insert “a”.

After “nonaerated polishing”, insert “lagoon”.

Delete “lagoons”.

Page 40

Section 18(1)(c)

Line 13

After “lagoon surface for”, insert “an aerated lagoon”.

Delete “aerated lagoons”.

Page 41

Section 18(6)

Line 10

After “(6)”, insert “An applicant”.

Delete “Applicants”.

Page 41

Section 19

Line 16

After “Sections 10”, insert “through”.

Delete “to”.

Line 17

After “WWTP that serves”, insert “a school”.

Delete “schools”.

Page 41

Section 19(2)

Lines 20 and 21

After “per student for”, insert the following:

an elementary or middle school, and

Delete the following:

elementary and middle schools, or

Lines 21 and 22

After “per student for”, insert “a high school”.

Delete “high schools”.

Page 42

Section 20

Line 5

After “of Sections 10”, insert “through”.

Delete “to”.

Page 42

Section 21

Line 16

After “of Sections 10”, insert “through”.

Delete “to”.

Line 17

After “regulation, the”, delete “following”.

After “requirements”, insert “in this section shall”.

Page 42

Section 21(1)

Lines 19 and 20

After “treated wastewater.”, insert “An applicant”.

Delete “Applicants”.

Line 20

After “proposing”, insert “a”.
After “higher application”, insert “rate”.
Delete “rates”.

Page 45

Section 22(8)

Lines 18 and 19

After “the plans and”, insert “specifications”.
Delete “specification”.

Page 47

Section 24(3)(a)

Line 3

After “401 KAR”, insert “Chapters”.
Delete “Chapter”.

Page 47

Section 24(3)(c)2.

Line 23

After “state, federal,”, insert “or”.
Delete “and”.

Page 48

Section 24(4)

Line 2

After “for an agricultural”, insert “waste”.
Delete “wastes”.

Page 48

Section 25

Lines 7 and 8

After “does not discharge and”, delete “not”.

Line 9

After “including agricultural”, insert “waste”.
Delete “wastes”.

Line 10

After “that dispose of”, delete “their”.

Page 48

Section 25(1)

Lines 16 and 17

After “KRS 224.71-100 through”, insert “224.71-145”.
Delete “224.72-145”.

Page 49

Section 25(3)(a)2.

Line 19

After “2. Daily”, insert “inspections”.

Delete “inspection”.

Page 52

Section 25(7)(a)

Line 4

After “401 KAR”, insert “Chapters”.

Delete “Chapter”.

Page 52

Section 25(7)(c)5.

Line 20

After “401 KAR”, insert “Chapters”.

Delete “Chapter”.

Page 53

Section 26

Line 6

After “A KISOP”, insert “shall be”.

Delete “is”.

Page 53

Section 26(3)

Lines 14 and 15

After “responsible party until”, insert “a”.

Delete “an”.

Page 53

Section 26(4)

Line 19

After “401 KAR”, insert “Chapters”.

Delete “Chapter”.

Page 53

Section 27

Line 22

After “Operational Permits.”, insert “An operational permit”.

Delete “Operational permits”.

Line 23

After “date of issuance”, delete the comma.

Page 54

Section 27(1)

Line 3

After “for a facility”, insert a comma.

Page 54

Section 28(3)

Lines 20 and 21

Delete subsection (3) in its entirety.

Page 54

Section 29(1)

Line 23

After “of Sections 7”, insert “through”.

Delete “to”.

Page 55

Section 29(1)

Line 1

After “provides sufficient treatment”, delete the comma.